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4 **UNITED STATES DISTRICT COURT**  
5 **DISTRICT OF NEVADA**

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7 KERI A. SARGENT,

8 Plaintiff,

9 v.

10 NANCY A. BERRYHILL, Acting  
11 Commissioner of Social Security  
Administration,

12 Defendant.

Case No. 2:16-cv-02149-RFB-PAL

**ORDER**

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15 **I. INTRODUCTION**

16 Before the Court is Plaintiff Keri Sargent's Motion for Reversal and/or Remand, ECF No.  
17 23, and Defendant Nancy A. Berryhill's Cross-Motion to Affirm, ECF No. 26. For the reasons  
18 discussed below, the Court finds that the ALJ's decision contains no legal error and is supported  
19 by substantial evidence. Therefore, the Court denies Plaintiff's Motion for Reversal and/or  
20 Remand and grants Defendant's Cross-Motion to Affirm.

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22 **II. BACKGROUND**

23 On October 19, 2009, Plaintiff completed an application for disability insurance benefits  
24 alleging disability since March 1, 2008. AR 99. Plaintiff was denied initially and upon  
25 administrative reconsideration. AR 99. Plaintiff requested a hearing before an Administrative  
26 Law Judge ("ALJ") and appeared on April 28, 2011. AR 83, 99. At the hearing, Plaintiff amended  
27 her application to request a closed period of disability, beginning on March 1, 2008 and ending on  
28 April 1, 2010, as her condition had improved and she had returned to work part-time at the level

1 of substantial gainful activity. AR 85. In an opinion dated May 3, 2011, ALJ Norman L. Bennett  
2 issued a fully favorable decision finding Plaintiff disabled within the closed period from March 1,  
3 2008 through April 1, 2010. AR 98–103.

4 On September 9, 2013, Plaintiff completed the instant application for disability insurance  
5 benefits alleging disability since June 11, 2013. AR 12. Plaintiff was denied initially and upon  
6 reconsideration, and she appeared before ALJ Betty Roberts Barbeito on October 22, 2015. AR  
7 12.

8 The ALJ published an unfavorable decision on January 13, 2016. AR 12–26. The ALJ  
9 followed the five-step sequential evaluation process for determining Social Security disability  
10 claims set forth at 20 C.F.R. § 404.1520(a)(4). At step one, that ALJ found that Plaintiff has not  
11 engaged in substantial gainful activity since the alleged onset date of June 11, 2013. AR 14. At  
12 step two, the ALJ found that Plaintiff has the following severe impairments: hypertension,  
13 personality disorder, and depressive disorder. AR 14. The ALJ noted that Plaintiff also has several  
14 non-severe impairments, including obesity, which do not represent more than minimal limitations  
15 in the ability to perform basic work activities. AR 15. At step three, the ALJ found that Plaintiff's  
16 impairments do not meet or medically equal a listed impairment. AR 15–17. Regarding the  
17 Paragraph B criteria, the ALJ found that Plaintiff has mild restrictions in activities of daily living,  
18 moderate difficulties in social functioning, and mild difficulties with concentration, persistence or  
19 pace. AR 16. The ALJ found no evidence that Plaintiff satisfies any Paragraph C criteria. AR  
20 16–17.

21 The ALJ found that Plaintiff has the residual functional capacity (“RFC”) to perform a full  
22 range of light work. AR 17. The ALJ found that Plaintiff is able to lift and carry 20 pounds  
23 occasionally and 10 pounds frequently, stand and/or walk six hours in an eight-hour workday, and  
24 sit six hours in an eight-hour workday. AR 17. She found that Plaintiff frequently is able to stoop  
25 and never climb ladders, that Plaintiff must avoid exposure to vibrations, machinery, and heights,  
26 and that Plaintiff has the ability to do simple, repetitive work in a structured environment as well  
27 as complex activities. AR 17. Finally, the ALJ found that Plaintiff is limited to occasional public  
28 activity. AR 17.

1 Based on this RFC, the ALJ found at step four that Plaintiff was unable to perform her past  
2 relevant work as a sales representative, sales manager, or receptionist. AR 24. At the last step,  
3 the ALJ determined that Plaintiff can perform a significant number of jobs in the national economy,  
4 including occupations such as assembler, cleaner, and packing line worker. AR 25. Therefore,  
5 the ALJ concluded that Plaintiff is not disabled. AR 26.

6 Plaintiff requested that the Appeals Council review the decision on February 12, 2016. AR  
7 8. The Appeals Council denied the request for review on September 26, 2016. AR 1–3.

### 9 III. LEGAL STANDARD

10 42 U.S.C. § 405(g) provides for judicial review of the Commissioner’s disability  
11 determinations and authorizes district courts to enter “a judgment affirming, modifying, or  
12 reversing the decision of the Commissioner of Social Security, with or without remanding the  
13 cause for a rehearing.” In undertaking that review, an ALJ’s “disability determination should be  
14 upheld unless it contains legal error or is not supported by substantial evidence.” Garrison v.  
15 Colvin, 759 F.3d 995, 1009 (9th Cir. 2014) (citation omitted). “Substantial evidence means more  
16 than a mere scintilla, but less than a preponderance; it is such relevant evidence as a reasonable  
17 person might accept as adequate to support a conclusion.” Id. (quoting Lingenfelter v. Astrue, 504  
18 F.3d 1028, 1035 (9th Cir. 2007)) (quotation marks omitted).

19 “If the evidence can reasonably support either affirming or reversing a decision, [a  
20 reviewing court] may not substitute [its] judgment for that of the Commissioner.” Lingenfelter,  
21 504 F.3d at 1035. Nevertheless, the Court may not simply affirm by selecting a subset of the  
22 evidence supporting the ALJ’s conclusion, nor can the Court affirm on a ground on which the ALJ  
23 did not rely. Garrison, 759 F.3d at 1009–10. Rather, the Court must “review the administrative  
24 record as a whole, weighing both the evidence that supports and that which detracts from the ALJ’s  
25 conclusion,” to determine whether that conclusion is supported by substantial evidence. Andrews  
26 v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995).

### 27 28 IV. DISCUSSION

1           **A. Res Judicata Does Not Apply.**

2           Plaintiff first argues that the ALJ erred at step two of the analysis by failing to consider  
3 obesity to be a severe impairment. ECF No. 23 at 27–30. Plaintiff argues that pursuant to res  
4 judicata principles, because ALJ Bennett found obesity to be a severe impairment in his May 3,  
5 2011 decision, ALJ Barbeito was bound to find the same in her January 13, 2016 decision. ECF  
6 No. 23 at 29.

7           Res judicata bars re-litigation of issues already decided. Paulo v. Holder, 669 F.3d 911,  
8 917 (9th Cir. 2011). The doctrine applies to administrative decisions, though with less rigidity.  
9 Chavez v. Bowen, 844 F.2d 691, 693 (9th Cir. 1988); Stuckey v. Weinberger, 488 F.2d 904, 911  
10 (9th Cir. 1973). However, the doctrine has no application in this context. ALJ Bennett’s findings  
11 are specific to the period between March 1, 2008 and April 1, 2010, while ALJ Barbeito’s findings  
12 begin with the alleged onset date of June 11, 2013. The two ALJs conducted the disability analysis  
13 within mutually exclusive time frames, and therefore no findings of fact made by ALJ Bennett  
14 bind ALJ Barbeito. See AR 97-4(9) (“[I]f the subsequent claim involves deciding whether the  
15 claimant is disabled during a period that was not adjudicated in the final determination or decision  
16 on the prior claim, SSA considers the issue of disability with respect to the unadjudicated period  
17 to be a new issue that prevents the application of administrative res judicata.”). It is entirely  
18 conceivable that Plaintiff’s obesity was a severe impairment limiting her ability to perform basic  
19 work activities from March 1, 2008 to April 1, 2010 but is no longer a severe impairment as of  
20 June 11, 2013. ALJ Barbeito was not bound to find otherwise, nor was she required to use the  
21 earlier finding of disability within a closed period as a reference point.

22           Moreover, even if the ALJ erroneously failed to include obesity at step two, Plaintiff does  
23 not identify any resultant harm. The ALJ included Plaintiff’s non-severe impairments in  
24 determining her RFC, and Plaintiff does not identify any effect of her obesity on her RFC that the  
25 ALJ failed to consider. See Burch v. Barnhart, 400 F.3d 676, 682–84 (9th Cir. 2005).

26           Plaintiff next suggests that the disability standard differs in this case because Plaintiff  
27 elected to request a closed period of disability in 2011. ECF No. 23 at 29–30. Plaintiff argues that  
28 had she not attempted to return to work, there would have been no closed period of disability and

1 she would continue to be disabled as a matter of law. But at the time of the 2011 ALJ hearing,  
2 Plaintiff was engaged in substantial gainful activity as a customer service sales representative and  
3 was therefore ineligible for disability insurance benefits at step one of the analysis. AR 85, 91.  
4 The favorable ALJ decision issued May 3, 2011 specifically found Plaintiff disabled only through  
5 April 1, 2010 and did not evaluate her disability beyond that date. Moreover, ALJ Bennett  
6 favorably acknowledged Plaintiff's good work history and return to substantial gainful activity as  
7 an indicator of her credibility in reporting the disabling nature of her symptoms within the closed  
8 period. AR 102. Plaintiff's suggestion that she would continue to have disability benefits to this  
9 day absent her choice to request a closed period is unsubstantiated.

10 **B. The ALJ Properly Weighed Each Medical Opinion.**

11 Plaintiff argues that ALJ Barbeito erred by rejecting her long-term treating providers. ECF  
12 No. 23 at 30. "The ALJ is responsible for determining credibility, resolving conflicts in medical  
13 testimony, and for resolving ambiguities." Andrews, 53 F.3d at 1039. When assigning weight  
14 and resolving conflicts in medical testimony, treating physicians are generally entitled to more  
15 weight than non-treating physicians. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). If a  
16 treating physician's opinion is well-supported by medical evidence and not inconsistent with other  
17 substantial evidence, it is given controlling weight. Orn v. Astrue, 495 F.3d 625, 631 (9th Cir.  
18 2007). The opinions of treating medical providers who are not considered "acceptable medical  
19 sources" are entitled to less deference than opinions of licensed physicians and other qualified  
20 specialists and may be rejected for germane reasons. Molina v. Astrue, 674 F.3d 1104, 1111 (9th  
21 Cir. 2012); see also 20 C.F.R. § 404.1527(f).

22 The ALJ permissibly declined to give controlling weight to the opinion letter provided by  
23 Plaintiff's primary care physician, Vipul Vijay Kubal, DO. AR 21–22. "The ALJ need not accept  
24 the opinion of any physician, including a treating physician, if that opinion is brief, conclusory,  
25 and inadequately supported by clinical findings." Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir.  
26 2002). In his opinion letter, Dr. Kubal summarily opined that Plaintiff cannot work due to severe  
27 anxiety and depression. AR 421. Because this assessment is brief, conclusory, and inadequately  
28 supported, the ALJ instead reasonably credited Dr. Kubal's mental status exams over time, which

1 “consistently showed the claimant had some depressed mood and tearful affect, but she was alert, fully  
2 oriented, adequately groomed, calm, and cooperative, with normal speech, good memory, adequate  
3 attention and concentration, average intelligence, fair insight, and good judgment.” AR 22.

4 The ALJ permissibly gave little weight to the opinion letter provided by Plaintiff’s treating  
5 counselor Marlina Robinson. AR 21. Ms. Robinson opined that Plaintiff “cries uncontrollably,  
6 cannot concentrate, is afraid to be alone or leave her home and has sleep/appetite difficulties,  
7 sadness, severe agitation, nothing is fun, disorganization and inability to function socially,  
8 domestically or occupationally.” AR 420. She reported that Plaintiff experiences panic attacks at  
9 least three times a day and “cannot carry a conversation, [ ] read or follow instructions.” AR 420.  
10 The ALJ reasonably found that this opinion contradicted Ms. Robinson’s treatment notes, “which  
11 showed the claimant was alert, adequately groomed, calm, and cooperative, with good eye contact,  
12 normal speech, euthymic mood, appropriate affect, optimistic and future-oriented conversation, logical  
13 stream of thought, average intelligence, fair insight, and good judgment.” AR 21. The ALJ identified  
14 significant discrepancies between the report and the notes: Plaintiff cannot, for example, be incapable  
15 of carrying a conversation, yet capable of optimistic and future-oriented conversation. The ALJ  
16 therefore provided a germane reason for giving Ms. Robinson’s opinion letter little weight.

17 The ALJ also permissibly gave little weight to a function report by treating psychotherapist  
18 Gina M. Abbeduto, M.S., LCPC. AR 22. The ALJ noted that Ms. Abbeduto’s observations were  
19 internally inconsistent. AR 22. Ms. Abbeduto opined that Plaintiff had a poor ability to perform  
20 simple and repetitive tasks, yet also indicated that Plaintiff had a good ability to make decisions  
21 without immediate supervision. AR 423. The ALJ’s observation of internal inconsistency, as well  
22 as inconsistency with records showing that Plaintiff has adequate memory, attention, and  
23 concentration, intelligence, and judgment, is a germane reason for giving Ms. Abbeduto’s report  
24 little weight.

### 25 **C. The ALJ Did Not Mischaracterize Dr. Fabella-Hicks’s Report.**

26 Plaintiff argues that the ALJ misleadingly and selectively quoted from the report submitted  
27 by consultative psychological examiner Verna Fabella-Hicks, PhD. ECF No. 23 at 31–32.  
28 Plaintiff argues that Dr. Fabella-Hicks’s assessment conclusively precludes all work.

1 Plaintiff, not the ALJ, mischaracterizes Dr. Fabella-Hicks's report. Dr. Fabella-Hicks  
2 noted Plaintiff crying throughout the interview and recognized that Plaintiff's depression and  
3 anxiety cause Plaintiff difficulty with consistently understanding, remembering, and carrying out  
4 even simple one- or two-step instructions. AR 417. Yet Dr. Fabella-Hicks also observed  
5 Plaintiff's ability to adequately complete the tasks assigned throughout the evaluation and  
6 predicted that Plaintiff's prognosis would improve with continued treatment. AR 418. The ALJ  
7 therefore did not mischaracterize the report when she stated the report showed that Plaintiff had  
8 "depressed mood, tearful affect, and some impaired immediate memory" but still "was able to  
9 follow and complete multi-step tasks." AR 21.

10 Plaintiff does not identify what component of the RFC finding is inconsistent with Dr.  
11 Fabella-Hicks's report. The RFC includes a limitation to work in a structured environment, AR  
12 17, which is consistent with difficulty understanding, remembering, and carrying out instructions  
13 on a sustained basis. Plaintiff argues that Dr. Fabella-Hick's finding that Plaintiff "may [ ] have  
14 difficulty" with understanding, remembering, and carrying out instructions on a sustained basis  
15 rises to the level of a "substantial loss" of Plaintiff's ability to do so, pursuant to SSR 85-15. To  
16 the contrary, Dr. Fabella-Hicks suggested the opposite when she assessed an overall fair prognosis  
17 with the expectation of further improvement. AR 418.

18 **D. Medical Expert Testimony Was Appropriate and Not Prejudicial.**

19 Plaintiff argues that it was inappropriate for the ALJ to consult a medical expert because  
20 the medical record was overwhelmingly favorable. ECF No. 23 at 4. An ALJ may obtain a  
21 medical expert's opinion when the medical evidence is contradictory, inconsistent, or confusing.  
22 HALLEX I-2-5-34. Based on the inconsistencies identified above and an overall assessment of  
23 the record, the Court finds that it was reasonable for the ALJ to seek medical expert testimony.

24 Plaintiff also argues that medical expert Robert J. McDevitt, MD, provided testimony at  
25 the hearing that was superfluous and misleading. ECF No. 23 at 32–33. Plaintiff asserts that Dr.  
26 McDevitt mischaracterized the reports submitted by Dr. Fabella-Hicks and Danielle T. Bello, PhD  
27 and gratuitously testified about the adverse pharmaceutical effects of BuSpar. Plaintiff's argument

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1 does not relate back to any findings in the ALJ's decision, and Plaintiff demonstrates no prejudice  
2 as a result of the identified elements of Dr. McDevitt's testimony.

3 **E. The ALJ Did Not Err in Considering Plaintiff's GAF Scores.**

4 Plaintiff suggests that the ALJ erroneously "rendered the GAF scores irrelevant" when the  
5 ALJ characterized them as "mere 'snapshots' of the claimant's functional abilities." ECF No. 23  
6 at 3–4. A Global Assessment of Function ("GAF") score "is a rough estimate of an individual's  
7 psychological, social, and occupational functioning used to reflect the individual's need for  
8 treatment." Brewes v. Comm'r of Soc. Sec. Admin., 682 F.3d 1157, 1160 n.2 (9th Cir. 2012)  
9 (citation omitted). The ALJ did not mischaracterize the nature of a GAF score when she explained  
10 that they indicate a claimant's level of functioning at a particular time, rather than a claimant's  
11 overall functioning. Garner v. Colvin, 626 F. App'x 699, 702 (9th Cir. 2015) (noting that a single  
12 GAF score represents "a snapshot impression and not a long-term prediction of RFC"). The ALJ  
13 also correctly explained that GAF scores have no direct correlation to the Social Security mental  
14 disorders listings. Doney v. Astrue, 485 F. App'x 163, 165 (9th Cir. 2012); 65 Fed. Reg. 50746,  
15 50764-65 (2000).

16 In this case, the medical record included a wide range of GAF scores recorded by various  
17 medical sources. The ALJ noted these throughout her assessment of the medical record and  
18 accorded them "some" weight. AR 19–21. Though some of Plaintiff's recorded GAF scores  
19 suggest more severe impairments than the ALJ found, the ALJ considered these GAF scores when  
20 resolving the conflicting medical evidence. Substantial evidence supports the ALJ's findings. See,  
21 e.g. Zerba v. Comm'r of Soc. Sec. Admin., 279 F. App'x 438, 439 (9th Cir. 2008) (substantial  
22 evidence in the medical record supported a determination that depression was not severe,  
23 notwithstanding a GAF score of 45).

24  
25 **V. CONCLUSION**

26 **IT IS HEREBY ORDERED** that Plaintiff's Motion for Reversal and/or Remand (ECF  
27 No. 23) is DENIED and Defendant's Cross-Motion to Affirm (ECF No. 26) is GRANTED.

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1           **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter a final judgment in  
2 favor of Defendant, and against Plaintiff. The Clerk of Court is instructed to close the case.  
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4           **DATED** this 18th day of November, 2018.



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5           **RICHARD F. BOULWARE, II**  
6           **UNITED STATES DISTRICT JUDGE**  
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